

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

OCT 25 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0127-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
STEVEN LESLIE SAPP,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR97000484B

Honorable Stephen M. Desens, Judge

REVIEW GRANTED; RELIEF DENIED

Steven Leslie Sapp

Watonga, OK
In Propria Persona

ESPINOSA, Judge.

¶1 After a jury trial in 1999, petitioner Steven Sapp was convicted of sale or transfer of a dangerous drug and sale or transfer of a dangerous drug to a minor. The trial court sentenced Sapp to concurrent and consecutive prison terms, the longest of which was 9.25 years, for this offense and for related offenses of which he was convicted in separate cases. We affirmed Sapp's convictions and sentences on appeal, *State v. Sapp*, No. 2 CA-

CR 99-0263 (memorandum decision filed Feb. 8, 2000), and denied relief on his petition for review of the trial court's denial of post-conviction relief, *State v. Sapp*, No. 2 CA-CR 2003-0121-PR (memorandum decision filed Nov. 9, 2004). Having initiated at least three previous post-conviction proceedings, Sapp then filed a pro se "Motion to Dismiss Based on Prosecutorial Misconduct" in January 2007. The trial court summarily denied Sapp's motion and his subsequent motion for rehearing. This petition for review followed.¹ We will not disturb a trial court's grant or denial of post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 Sapp argues he is entitled either to an evidentiary hearing or to dismissal of his indictment based on newly discovered evidence of prosecutorial misconduct—specifically, he claims the prosecutor knew the indictment was obtained based on false testimony. Sapp's claim fails for two reasons. First, having acknowledged that the "newly discovered" evidence existed at the time of trial and that it "had always been in the record for all those years without discovery," it is not, by definition, newly discovered absent a showing, *inter alia*, that Sapp "exercised due diligence in securing the newly discovered material facts." Ariz. R. Crim. P. 32.1(e)(2). As the state noted in its opposition to the motion to dismiss, Sapp offered no explanation why he could not have discovered this information that he

¹Although Sapp did not characterize his motion to dismiss based on evidence of prosecutorial misconduct as a petition for post-conviction relief, it is cognizable only as a post-conviction claim pursuant to Rule 32, Ariz. R. Crim. P., and we thus treat it as such.

claims was in the original trial record before trial or, at the very least, in the eight years since then. *See State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000) (“Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence.”). Accordingly, this evidence was not newly discovered.

¶3 Second, Sapp has previously raised claims of prosecutorial misconduct both on appeal and in an earlier post-conviction proceeding. On appeal, we rejected Sapp’s argument that his motion for new trial should have been granted based on “the claim that the prosecutor committed misconduct by permitting the informant to testify on redirect examination and by the prosecutor’s comments during closing argument.” *Sapp*, No. 2 CA-CR 99-0263, ¶ 19. Similarly, in his first petition for review, Sapp raised this same challenge to the prosecutor’s conduct during closing argument, also asserting that trial counsel had been ineffective in failing to object to that conduct. In our decision order on review, we noted that, because we had reviewed this same issue for fundamental error on appeal and had found no such error, counsel’s failure to object on this basis at trial did not constitute ineffective assistance. *Sapp*, No. 2 CA-CR 2003-0121-PR, ¶ 7. Having failed to establish a colorable claim falling within any of the exceptions to preclusion specified in Rule 32.2(b), Ariz. R. Crim. P., and having previously raised related claims of prosecutorial misconduct that were finally decided on the merits, Sapp is precluded from bringing yet

another such claim. *See* Ariz. R. Crim. P. 32.2(a)(2) and (3) (precluding claims raised and adjudicated in prior proceedings or claims waived by defendant’s failure to raise them on appeal or in previous collateral proceeding).

¶4 Sapp also asserts a claim of actual innocence but fails, as required by Rule 32.2(b), to set forth the reasons for not raising the claim in a previous petition and why the facts underlying the claim “would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense.” Rule 32.1(h).

¶5 We grant the petition for review, but finding no abuse of discretion in the trial court’s denial of the motion to dismiss, we deny relief.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge